

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee-Plaintiff,

vs.

No. 19-4758

BRIAN DAVID HILL,

Defendant-Appellant.

EMERGENCY MOTION FOR STAY OF IMPRISONMENT PENDING APPEAL

COMES NOW the Appellant Brian David Hill, by counsel, and moves this Honorable Court to stay execution of his sentence of imprisonment in accordance with 18 U.S.C. § 3143(b). In support of this motion, the Appellant states as follows:

The undersigned was appointed as appellate counsel by this Court eight (8) days ago. As such, the undersigned has not yet been able to fully review the massive record, which includes two (2) previous appeals to this Court, one of which resulted in remand. The supervised release violation hearing before the district court has recently been transcribed, but the undersigned has not yet received a copy. However, Mr. Hill is scheduled to be incarcerated for nine (9) months beginning on December 6, 2019, less than one (1) month from now, unless this Court intervenes.

The Supreme Court of the United States, in *United States v. Haymond*, 139 S. Ct. 2369, 2380-81 (2019), made a paradigm shift in the law by establishing that the Sixth Amendment right to trial by jury also applies to supervised release revocation hearings. Appellant was sentenced to nine (9) months of incarceration without a jury based upon facts determined by a district judge. Hence, this appeal raises a substantial question of law or fact likely to result in a reversal, an order for new trial, and/or a sentence that does not include

incarceration.

Title 18 U.S.C. § 3143(b) reads, in pertinent part,

(b) Release or detention pending appeal by the defendant.--(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

This appeal is not for the purpose of delay and will raise substantial questions of law and fact which are likely to result in a reversal, an order for a new trial, or a sentence that does not include incarceration.

As stated above, the undersigned counsel has recently been appointed by the Court as appellate counsel and has been representing Appellant for only eight (8) days. During that short time, has determined, from the record he can currently access, that Appellant appeared before the United States District Court for the Middle District of North Carolina on September

12, 2019, wherein, that Court conducted a hearing, without a jury, in which it made findings of fact regarding Appellant's alleged guilt, again without a jury, and then sentenced Appellant to nine (9) months of incarceration. Given the *Haymond* decision, it is likely that this appeal will result in a reversal, an order for a new trial, and/or a sentence that does not include a term of imprisonment.

Additionally, Appellant is not likely to flee or pose a danger to the safety of any other person or the community. Appellant has a permanent address and a family support system and the alleged offense which lead to his revocation hearing, even if, *arguendo*, true, was a non-violent offense. Hence, Appellant is not likely to flee or pose a danger to the safety of any other person or the community, if released.

In addition to the issues above which Appellant has alleged and that the undersigned will investigate in good faith during the appellate process, there are questions of law regarding the re-sentencing of Appellant including, but not limited to, the application of the sentencing guidelines.

As stated above, Appellant is scheduled to begin his nine (9) month sentence of incarceration on December 6, 2019, just weeks before Christmas, unless this Court intervenes. There is a very real possibility that, even if this Court eventually rules that his sentence should be vacated or reduced, such ruling would occur after he has already served his sentence. He would be essentially left without a remedy.

The government and the administration of justice would not be prejudiced in any way because, should this Court later affirm the district court, Appellant would then be able to serve his sentence without the risk of it later being found in error.

Given the *Haymond* case and the concerns alleged by Appellant, which the

undersigned will investigate during the course of this appeal, combined with those issues that were communicated to the district court, Appellant believes that he has made the requisite showing of a likelihood of success which meets the requirements of the statute. Since he is also not a flight risk or danger to the community, he urges this Court, out of an abundance of caution, to allow him to remain free during the pendency of his appeal so as to prevent a potential injustice to him having his sentence reduced or eliminated after he has already served his sentence.

The government indicates that it does intend to oppose this motion and file a response thereto.

Therefore, for the reasons stated above, the Appellant moves this Honorable Court to grant his motion for stay of imprisonment pending appeal.

Dated this 8th day of November, 2019.

ROBINSON & McELWEE PLLC

/s/ E. Ryan Kennedy
E. Ryan Kennedy
(W. Va. State Bar I.D.: 10154)

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CERTIFICATE OF SERVICE

I, E. Ryan Kennedy, counsel for defendant-appellant, Donald Covington, hereby certifies that on the 8th day of November, 2019, I caused to be served a true and exact copy of the **Emergency Motion For Stay Of Imprisonment Pending Appeal** to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to counsel for appellee-plaintiff

/s/ E. Ryan Kennedy

E. Ryan Kennedy

(W. Va. State Bar I.D.: 10154)